IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

Bail Appl..No. 5155 of 2007()

CRMP.2781/2007 of I ADDL. DISTRICT COURT, PALAKKAD
CRIME NO.333/05 OF ALATHUR POLICE STATION

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PETITIONER - ACCUSED NO.11

NISHIL, S/O.RAMACHANDRAN, AGED 29 YEARS,
PAYYAPPATT VEEDU, POLYGARDEN ROAD,
LAKKIDI, OTTAPPALAM TALUK, PALGHAT.

BY ADV. SRI.MANSOOR.B.H.

RESPONDENTS: COMPLAINANT AND STATE

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1. THE STATION HOUSE OFFICER,
ALATHUR POLICE STATION,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

2. STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JAI GEORGE.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 10/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

9. Thereafter he can be remanded to custody by the Magistrate only if he is not in a position to offer bail.

10. When the accused is so released under the proviso to Sec.167(2) of the Cr.P.C. it shall be deemed that such release is under Chapter 33 of the Code.

11. Such bail is also liable to be cancelled under Sec.437 (5) or Sec.439(2) of the Cr.P.C. as the case may be.

12. If the final report was filed after 60 or 90 days as the case may be and the accused has not availed such indefeasible right to be released on bail before the final report is filed, he cannot claim such right to be released on bail.

The question that I have to consider is not covered by the above principles or precedents squarely. In the instant case bail by default is granted. That bail is cancelled for non-compliance with the conditions imposed. That cancellation is not challenged and has become final. The accused is taken back to custody in pursuance of the order of cancellation. A further period of 90 days has elapsed again from the date on which he was rearrested. 90 days has elapsed again from such date of rearrest. Still no final report is filed. Is the accused again entitled to be released on bail under the proviso to Sec.167(2) of the Cr.P.C.? That squarely is the question to be

decided.

The learned counsel for the petitioner contends that the salutary principles underlying the proviso to Sec.167(2) may not be lost sight of. An accused person is entitled to speedy trial. Right to speedy trial stumps from the right to live under Art.21 of the Constitution. Indefinite detention of the accused without any formal indictment is frowned upon by the Parliament. That is prompted the Parliament in the 1973 Code to introduce the proviso to Sec.167(2). However, grave and serious the offence may be an accused cannot be kept in pretrial detention beyond the period of 90 days. The law compels an investigating authority to complete the investigation and file final report within 90 days at the latest. Beyond that even in the gravest of cases an accused cannot be kept in custody. Completion of investigation within 90 days when the accused is in custody is the objective sought to be achieved by the proviso to Sec.167(2) of the Cr.P.C. For that mandate to be implemented religiously an accused must be held to have subsequent right also, notwithstanding the earlier cancellation of bail to fresh by default after the elapse of 90 days after the date of rearrest also. An interpretation in favour of liberty of the individual may be adopted by the court. Merely because the bail was once

cancelled, the obligation of the Investigator to complete the investigation within 90 days of detention may not be watered down.

The learned Public Prosecutor on the other hand contends that the right of the individual will have tobe balanced with the societal perspective. An accused who is continuing in custody pending investigation simplicitor cannot be equated with an accused who has been granted bail and whose bail has been cancelled subsequently for specific reasons under Sec.439(2) of Sec.437(5) of the Cr.P.C., submits the learned Public Prosecutor. Merely because the Investigator has not been able to complete the investigation within the period of 90 days after arrest or rearrest as the case may be, an accused person who has violated the conditions of bail order who has forfeited his right to continue on bail may not be conferred with a further right to be released on bail, submits the learned Public Prosecutor. The position of an accused whose bail has been cancelled under Sec.439(2) or Sec.437(5) is qualitatively different from an accused person who is continuing in custody for 90 days after his arrest without a charge sheet being filed against him. The purpose, objective and scheme of Sec.167 of the Cr.P.C. may be alertly borne in mind, submits the learned Public Prosecutor.

Having rendered my very anxious consideration to all the relevant circumstances, I am of opinion that the contention of the learned Public Prosecutor is to be accepted. While interpreting the proviso to Sec.167(2) the sacrum sant right of the individual to freedom and liberty must be balanced with the societal needs and requirements. A person who has abused the freedom granted to him and hence is rearrested must certainly be distinguished from an unauthorised accused who has to continue in custody merely because the Investigator has not completed the investigation within a period of 90 days.

In this context, I take note of the deeming fiction under Sec.167(2) that an accused released under the proviso to Sec.167(2) shall be deemed tobe one who has been granted bail under Chapter 33. That inevitably means that the bail granted to him can be cancelled. Even when the circumstance which entitled him to grant of bail – the non-filing of the final report within 90 days, continues with the bail granted to an accused can be cancelled. This squarely shows that the right of an accused to be released on bail whether under the proviso to Sec.167(2) or otherwise is subject to his observance of the conditions of bail and subject to proper conduct on his part which does not disentitle him to continue on bail. If bail by

default granted after 90 days is liable to be cancelled later on the ground of abuse of the liberty or violation of conditions even when the default in filing the final report continues. There can be no rhyme, reason or principle in insisting that a person who has been rearrested must again be granted the benefit of proviso to Sec.167(2) when the period of detention exceeds 180 days.

Such an accused continues in custody because he has abused the freedom/liberty granted to him. The case of such a person must definitely be distinguished from a person who continues in custody without any charge sheet being filed against him.

It will not be inapposite in this context to take note of Sec.436(2) of the Cr.P.C. In a bailable offence an accused has a right tobe released on bail. Even such a right is condition by the stipulation in Sec.436(2) which entitles the court to refuse bail to such a person if he does not comply with the conditions imposed. The policy of the laws is clearly reflected in Sec.436(2). Even when the offence is bailable, bail can be refused if conditions of bail are violated. If that be the case, the position of an accused who has been granted default bail under the proviso to Sec.167 (2) cannot be any better.

As it was submitted at the Bar that there is no precedent

covering the issued, the Additional Director of the Judicial Academy Sri.Abraham Mathew was requested to research the point and assist the court. He has pointed out to me that a decision of the U.P. High Court in …….. gives some light on this aspect. In para-11 of the said decision, the following passage appears:

Of course, the question considered in that case was not exactly identical. But the process of reasoning by the learned Judge Justice H.N. Sith appears to be in conformity with the process of reasoning which I have sought to accept.

I do, in these circumstances, come to the conclusion that an accused is entitled for default bail only once in respect of a claim and in a case where the bail granted to him has been cancelled under Sec.439(2) or Sec.437(5) of the Cr.P.C. He cannot again claim the benefit of the proviso to Sec.167(2).

This is, of course, not to say that the long period of incomplete investigation cannot weigh with the court while considering the grant of bail afresh under Sec.437 of Sec.439. The discretion under Sec.437/439 will have to be alertly exercised taking into account all the relevant circumstances. Merely because an accused has committed breach of the obligation in a bond , endless detention pending investigation

need not be authorised. But that will not be a case of grant of bail by default under the proviso to Sec.167(2). It can ony be a case of exercise of discretion under Sec.437 and/or Sec.439.

The question then is whether such discretion is liable to be exercised in this case. The allegations against the petitioner are serious. He was allegedly a conspirator and he had also taken part in the incident proper. He had violated the conditions of bail when he was released under the proviso to Sec.167(2). He has been involved in four crimes including crimes punishable under Secs.302, 308 and 402 of the IPC. while he was on bail granted to him earlier. In these circumstances, notwithstanding the fact that the petitioner has been in custody pending investigation from 20/8/ to 21/11/05 and from 2/5/07 till this day I am satisfied that the petitioner is not entitled to be granted bail.

I do however note that the dissatisfaction with the investigation in this case has not been completed. The learned Public Prosecutor submits that the investigation shall be completed as expeditiously as possible. The Investigator requires some further time as accused Nos.8 and 9 have not been arrested so far. The learned Public Prosecutor prays that one month’s further time may be granted to the Investigator to

complete the investigation.

This petition is, in these circumstances, dismissed. But I may hasten to observe that the petitioner shall be at liberty to move this Court for bail again at a later stage of the investigation – not, at any rate, prior to 26/11/07. Needless to say, after the final report is filed the petitioner shall be at liberty to approach this Court for bail again and his application shall be considered afresh on merits at that stage.

(R. BASANT, JUDGE)

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